IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JENNIFER BRADLEY	*	
Plaintiff	*	
v.	*	**Case No: 1:16-CV-00346 (RBW)** **Judge Reggie B. Walton**
NCAA, et al	*	
Defendants	*	

DEFENDANT THE AMERICAN UNIVERSITY'S
REPLY TO PLAINTIFF'S OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
REGARDING DUTY AND MEDICAL NEGLIGENCE

COMES NOW the Defendant, THE AMERICAN UNIVERSITY, by and through its counsel, John J. Murphy, Esq., and Walker, Murphy & Nelson, LLP and, pursuant to the Federal Rules of Civil Procedure and this Honorable Court's Scheduling Order, hereby files this short Reply to Plaintiff's Opposition to Motion for Summary Judgment Regarding Duty and Medical Negligence.

1. While Plaintiff is correct in that American University's current motion raises similar arguments to those raised in its preliminary motion to Dismiss, Plaintiff's Opposition does not appear to appreciate the obvious difference in the applicable legal standards between a preliminary motion to dismiss and a motion for summary judgment at the close of discovery. This Court's April 12, 2017 Order expressly noted the obvious different, stating "[i]n this case, discovery has not commenced, and at the motion to dismiss stage, the Court is only tasked with testing the legal sufficiency of the allegations in the plaintiff's complaint, not the 'plaintiff's likelihood of success on the merits.'" *ECF 36 at p. 43.*

2. Plaintiff attempts to distinguish all of the persuasive case law cited by this Defendant advocating for this Court to find that American University did not owe a duty to the Plaintiff, or that any duty owed is subject to a heightened standard, but does not cite any new case on point with a similar fact pattern to suggest otherwise.[1] If this Court were to accept American University's position, and apply either a "no duty" or "heightened standard" as Defendant's persuasive case law suggests is appropriate, then there should be no dispute that American University is entitled to summary judgment as a matter of law.

3. Without any case law on point, Plaintiff's Opposition argues that this Defendant had a general duty of care to its student athletes and devotes several pages of its response to citing irrelevant testimony from the NCAA as to its policies / procedures. *See, ECF 82-1 at pp. 5 – 8.* While Plaintiff goes on to "contend[ ] that this Court should determine that a duty existed as it was reasonably foreseeable that if Defendant AU was not in compliance with the appropriate rules and regulations as pertains to concussion management plans, an individual such as Ms. Bradly would suffer the injuries as alleged," her "contention" ignores the fact that Plaintiff's own "world renowned" expert, Dr. Cantu, had no issue with American University's concussion management protocols or how they were implemented by American University's training staff in the case at bar. *Compare ECF 82-1 at p. 9 with Deposition Testimony of Dr. Cantu, excerpts attached hereto as* **Exhibit 1** *at p. 47* (explaining he was *not* "criticizing" American University's policies and that they were "all reasonable and appropriate.")

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[1] As is consistent across all of Plaintiff's Oppositions, to the extent that she "disputes" in whole or in part certain "facts" set forth by the Defendants, her Oppositions have been devoid of Affidavits or other admissible testimony as required by Rule 56 of the Federal Rules of Civil Procedure. *See, e.g., ECF 82-1 at p. 2* (identifying certain facts as "disputed" without citations).

4. Plaintiff's best (and only) cited case imposing a legal duty upon a University in the student-athlete context is *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3rd Cir. 1993) but as the *Kleinknecht* Court expressly stated "[o]ur holding is narrow. It predicts only that a court applying Pennsylvania law would conclude that the College had a duty to provide prompt and adequate emergency medical services to Drew, one of its intercollegiate athletes, while he was engaged in a school-sponsored athletic activity for which he had been recruited." *989 F.2d. at 1371.* Again, turning to the deposition testimony of Plaintiff's "world renowned" expert, Dr. Cantu, he conceded at deposition that "I believe that the athletic training staff at American University evaluated Jennifer and put her through a reasonable assessment for an athletic trainer, meaning the SCAT2 as of 2011. And abnormalities were found on that test, and it was reasonable that they did refer Jennifer on to Dr. Williams. And at that point up through right where we are now, on the 4th and the 5th, I don't have a problem with the care that the athletic trainers provided for Jennifer." *Exhibit 1 at p. 45.* Stated alternatively, assuming *arguendo* this Court were to adopt the *Kleinknecht* rational contrary to the weight of legal authorities cited by the defense, this Defendant would *still* be entitled to summary judgment as a matter of law.[2,3]

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[2] Plaintiff's Opposition cites to the testimony of Corey Andres as being critical of Coach Jennings for not sitting Plaintiff out of a game until she was assessed by medical staff. *ECF 82-1 at pp. 14-15.* As set forth elsewhere, this Defendant has moved to strike Mr. Andres' testimony and even if allowed to stand Plaintiff has no causal link to this alleged breach and any damages. *See, e.g., ECF 74 and 75.*

[3] Plaintiff's Opposition also cites to Dr. Vollmar's criticism of Trainer Earls' "delay" in administering the SCAT testing. *ECF 82-1 at pp. 15.* This is really the crux of Plaintiff's case against the University, and while not "emergency care" within the context of *Kleinknecht,* even if this Court were to apply a general duty standard to the University *and* Dr. Vollmar were qualified to render an opinion against an athletic trainer, Plaintiff still would not be able to establish a causal link to this alleged negligence. *See, ECF 75.*

5. Regarding Plaintiff's vicarious liability claim, American University does not contest that Coach Jennings and Athletic Trainers Dash and Earls were employees, nor even that Dr. Higgins was an apparent agent under the District's ostensible agency law. Insofar as Dr. Williams is concerned, however, Plaintiff has claimed repeatedly that he is an agent of both Dr. Higgins and the United States of America. *See, ECF 89 and 91.*

6. Plaintiff's Opposition sets forth no law or cogent argument as to how athletic trainers could be deemed health care providers under the laws of the District of Columbia. It is also patently obvious from Plaintiff's pleadings that her theories oscillate from filing to filing in an effort to escape inevitable judgment in favor of the Defendants. *Compare ECF 82-1 at p. 23* ("In this case, it has been sufficiently pled and demonstrated that the training staff – specifically Jenna Earls and Sean Dash – were undertaking professional services and treating Ms. Bradley") *with ECF 81-1 at p. 4* (Neither Dr. Cantu nor Dr. Vollmar are "expected to testify to deviations of the standard of care by Mr. Dash in his *treatment* of Ms. Bradley").

7. While this Defendant steadfastly maintains that it is entitled to summary judgment as a matter of law on numerous grounds previously briefed at length, should this Court disagree then granting this Motion in part will at least help limit Plaintiff's claims and guide the parties in trial preparations once the applicable legal duty to be applied has been defined by this Court.

Respectfully submitted,

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/s/ John J. Murphy

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply to Opposition to Motion for Summary Judgment Regarding Duty and Medical Negligence was served electronically this 4th day of February, 2019 to:

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Respectfully submitted,

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/s/ John J. Murphy

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EXHIBIT 1

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aware of is the date of the SCAT2 examination.
Q. Okay. So, then, this may shorten up my questions considerably. Let me ask you broadly.
As you sit here today, are you of the opinion that any athletic trainer at American University breached any applicable standards of care?
MR. NACE: Objection.
THE WITNESS: I believe that the athletic training staff at American University evaluated Jennifer and put her through a reasonable assessment for an athletic trainer, meaning the SCAT2 as of 2011. And abnormalities were found on that test, and it was reasonable that they did refer Jennifer on to Dr. Williams.
And at that point up through right where we are now, on the 4th and the 5th, I don't have a problem with the care that the athletic trainers provided for Jennifer.
Q. (By Mr. Murphy) Okay. And, like I said, that's going to help shorten at least my part of this deposition up considerably. Let me ask sort of a follow-up question to that.
I believe, if I have my information

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correct, that it was October 5th when Dr. Williams saw the plaintiff. And I'll let his counsel ask questions about Dr. Williams.
Specific to the athletic trainers, do you have any standard of care opinions against the athletic trainers once the plaintiff was seen by Dr. Williams -- from that point going forward?
A. Yeah, I'm not an athletic trainer, and we don't render standard of care opinions about athletic trainers across the field. I render standard of care opinions about assessments for a concussion, though, when that might involve an athletic trainer, and when that might involve a physician.
The person that I have the most criticism for in this case is Dr. Williams. And we'll get to that, obviously.
But when Dr. Williams used, "I can't identify a mechanism," as an excuse to limit concussion as a diagnosis, when all the symptoms were consistent with concussion, when it came after the night of a game in which she sustained head trauma, when that head trauma is on the SCAT2 form, documented by the athletic

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trainer, I think the trainer should have pushed harder to get further assessment. Because that wasn't a reasonable decision on Dr. Williams' part, and the athletic trainer should have understood that it's not reasonable.
But the athletic trainer does work under Dr. Williams, so I'm not holding that to be a standard of care.
Q. I think you said this in your report, but I want to make sure.
You don't have any problems or objections to the actual concussion management plan in place at American University, do you?
MR. NACE: Objection.
THE WITNESS: I think I do remember reading it. I don't sit here today and remember it word for word. I'm not sitting here criticizing that.
I do remember from the depositions of multiple people that that plan said if a concussion is diagnosed, the individual should be removed until symptoms have cleared, or at least until they're back to baseline. And then an exertional protocol -- that is all reasonable and appropriate.

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Q. Have we now -- well, I guess, as I understand your testimony, Doctor, you're not going to render the opinion that anyone at American University athletic training staff violated, quote, unquote, "Standards of care."
Is that -- to be as broad as possible, is that fair?
MR. NACE: Objection.
THE WITNESS: No. No, it's not.
In my opinion, Dr. Williams violated standard of care. And in my opinion, Dr. Higgins, as a responsible individual for the medical care being provided and, therefore, that Dr. Williams was doing the right thing, is responsible as well.
Q. (By Mr. Murphy) Okay. And I'm sorry if I misphrased that. I was kind of limiting my question, again, to the athletic trainers at American University. Let me ask you this question.
Do you have any criticism of any of the subsequent treating healthcare providers? And I'll start with the folks at Georgetown and the ENT.
MR. NACE: Objection.

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FOR THE DISTRICT OF COLUMBIA

JENNIFER BRADLEY,	*	
Plaintiff	*	
v.	*	**Case No: 16-346**
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Defendants	*	

ORDER

UPON CONSIDERATION of, Defendant THE AMERICAN UNIVERSITY'S Motion for Summary Judgment Regarding Duty and Medical Negligence, and any Opposition thereto, it is hereby this _____ day of _____, 2018, ORDERED:

1. That Defendant THE AMERICAN UNIVERSITY'S Motion for Summary Judgment is hereby GRANTED; and
2. That Judgment is entered in favor of THE AMERICAN UNIVERSITY.

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JUDGE, United States District Court
for the District of Columbia